

Ministry of Unification, Gaesung Gong-dan Sa-eop Cham-go Ja-ryo [Reference concerning the Gaesung Project], July 22, 2005

Ministry of Unification, *Bo-do Ja-ryo [Press Release]*, August 5, 2005

Seung-Ho Ryu, *Cheong-san Kyeol-je Je-do Do-ip-ui Hyo-kwa [The Effect of Introduction of Clearing Settlement System]*, Su-eun Hae-oe Kyeong-je [Su-eun Overseas Economy], November 2003

Yonhap, *Buk Beop-joen Kuk-nae Pan-mae Eo-Tteon Ui-mi Gat-na [What Does the Sale of North Korean Code Collections mean?]*, ChosunIlbo, January 31, 2005

Yonhap, *Buk Beop-jeon Bal-gan Jeong-bu Kwan-kye-ja-ui Ban-eung [South Korean Officials Comments on North Korea's Publication of Code Collections]*, ChosunIlbo, January 16, 2005

Yonhap, *Interview: Chang Meong-Bong Buk-han-beop Yeon-gu-hoe-jang [Interview with Meong-bong Chang]*, ChosunIlbo, January 16, 2005

**South Korea's System of Export Control  
on Strategic Items and Its Effective Enforcement  
Policy to Facilitate Economic Cooperation  
between South and North Korea**

*Seung Hwan Choi\**

**Abstract**

*Because of the heightened concerns over terrorism and national security raised by the attacks of September 11, 2001 in the United States (U.S.), multilateral export control regimes tightened export controls of dual-use items for national security. Multilateral export control regimes initiated by the U.S. seek to prevent the proliferation of nuclear, chemical, biological, and conventional weapons. South Korea is a party to all relevant nonproliferation regimes (NSG, AG, MTCR) and the Wassenaar Arrangement. South Korea introduced "Catch-all" controls to its export control system in January 2003, and established the Strategic Items Control Division (SICD) within the Ministry of Commerce, Industry and Energy (MOCIE) in February 2004. In August 2004, the Strategic Trade Information Center (STIC) opened as a nongovernmental organization to serve as a consultation or information center regarding the export of strategic items and to assist private sector compliance with export control regulations. South Korea's export control regulations on strategic items include the Foreign Trade Act (FTA: Articles 21, 54, 56, 58), Enforcement Decrees of FTA (Articles 39-45) and the Public Notice of Export/Import (consisted of 68 Articles and 25 Annexes). They have been revised to reflect the changes in the multilateral export control regimes, and apply to exports and re-exports of civilian and dual use items (products, software, technology). Violations of the export control regulations may be*

\* Professor of Public International Law and International Economic Law, College of Law/Graduate School of International Legal Affairs, Kyung Hee University. B.A., LL.M. and J.S.D.(Seoul National University); LL.M. & 2nd LL.M.(N.Y.U. School of Law). He is a member of Steering Committee of the Strategic Trade Information Center (STIC), Korea International Trade Association (KITA). This article does not represent the official views of STIC. The views and opinions expressed are purely personal. E-mail Address: tomichoi@khu.ac.kr

*subject to both criminal and civil penalties. Thus, South Korea has the legal and administrative systems to comply with and implement multilateral export control regimes and the Security Council Resolution 1540 (on nonproliferation of WMD). Multilateral and national export control regimes have played an important role to combat against terrorism and the proliferation of WMD. However, multilateral and national export control system may impede the expansion of economic cooperation between South and North Korea. With a view to carrying out successfully economic cooperation with North Korea, a strategy to enhance the effectiveness of export control system should be reviewed. In this context, this article proposes some policies to administer effectively the export control system for successful economic cooperation between South and North Korea.*

## I. Introduction

In December 2004, the Republic of Korea (South Korea) and Democratic People's Republic of Korea (North Korea) opened the Kaesong Industrial Complex in the city of Kaesong, North Korea, which is about 8 kilometers north of the Demilitarized Zone (DMZ). On December 15, 2004, stainless-steel pots, the first products made by a kitchenware company "Living Art" at the Complex, were shipped from the Complex to South Korea, and sold out at a department store in Seoul.<sup>1)</sup>

The Kaesong Industrial Complex project has been considered a symbol of inter-Korean reconciliation and is one of the significant inter-Korean projects as part of Seoul's "Sunshine policy" toward Pyongyang since the historic summit meeting between the two held at Pyongyang in June 2000.<sup>2)</sup> Development of the Complex created new momentum for increasing and enlarging inter-Korean trade. According to a report "Trends of South-North Trade in January-July 2005" issued by the Korea International Trade Association (KITA) in August 2005, South Korea exported US\$ 413.96 million worth of equipment and materials to North Korea in connection with the project, while importing US\$ 167.79 million worth of goods from the North. Two-way trade in the first seven months of this year reached US\$ 581.75 million, a sharp rise of 55.5% compared with the same period in 2004.<sup>3)</sup>

Recently at the 10th round of the Committee Meeting for the Promotion of Inter-Korean Economic Cooperation from July 9 to 12, 2005 in Seoul, South and North Korea agreed i) to pursue economic cooperation projects in a new manner by combining their economic elements such as resources, capital and technology so as to achieve balanced development of the national economy, ii) to open an Office for Inter-Korean Economic Cooperation Consultation within the Kaesong Industrial Complex in September 2005, iii) to swiftly construct infrastructural facilities

1) "Koreas Celebrate First Joint Venture Production," *The Korea Herald*, December 16, 2004.

2) Other major inter-Korean projects under way include sightseeing tours to North Korea's scenic Mt. Geumgang and the reconnection of cross-border railways and roads that were severed just before the start of the Korean War in June 1950.

3) KITA, "Trends of South-North Trade in January-July 2005," August 23, 2005, available at [http://www.kita.net/top/state/n\\_submain\\_stat.jsp?menuId=07&subUrl=n\\_default-test.jsp?lang\\_gbn=kor^statid=nks&top\\_menu\\_id=db11](http://www.kita.net/top/state/n_submain_stat.jsp?menuId=07&subUrl=n_default-test.jsp?lang_gbn=kor^statid=nks&top_menu_id=db11) (Last visited, August 30, 2005).

necessary for the first stage development of the Complex covering 3.3 million square meters so as to ensure provision of electricity, communications, industrial water, etc., and iv) to take necessary steps to effectuate the already reached “nine agreements”<sup>4)</sup> in order to ensure institutional framework for economic cooperation, etc.<sup>5)</sup>

It is, thus, expected that economic cooperation combining South Korea's capital and technology with North Korea's cheap labor and raw materials will be facilitated more than ever,<sup>6)</sup> owing to the Kaesong Industrial Complex project and the South-North Agreement at the 10th round of the Committee Meeting for the Promotion of Inter-Korean Economic Cooperation. Among others, the low level of the minimum monthly wage for the Complex (US\$ 57.50 as against US \$845), a corporate tax rate half the South's (14% as against 27%),<sup>7)</sup> and the high quality of the North Korean workers will help small-and medium-sized South Korean businesses recover their competitiveness.

Economic cooperation has political as well as economic implications. Economic cooperation between the two Koreas is expected to lay the foundation for peaceful reunification of Korea by promoting peace on the Korean peninsula and achieving mutual prosperity. The expansion of economic cooperation will ultimately lead to the creation of an inter-Korean economic community.

However, there are also obstacles to the success of the South-North economic cooperation. The Kaesong Industrial Complex project has raised concerns over the

4) Nine Agreements on Inter-Korean Economic Cooperation effectuated on August 15 are as follows: the Basic Agreement on Operation of Vehicles on the Roads between the Two Koreas, the Agreement on Communications in the Kaesong Industrial Complex Zone, the Agreement on Customs Clearance in the Kaesong Industrial Complex Zone, the Agreement on Quarantine in the Kaesong Industrial Complex Zone, the Agreement on the Composition and Operation of Inter-Korean Commercial Dispute Arbitration Committee, the Agreement on the Entry and Stay in the Kaesong Industrial Complex Zone and Mt. Geumgang Tourism Zone, the Agreement on Rail Services between the Two Koreas, the Agreement on Inter-Korean Maritime Transportation, the Supplementary Agreement on the Implementation and Observation of the Agreement on Inter-Korean Maritime Transportation.

5) Agreement at the 10th Meeting of the Inter-Korean Economic Cooperation Promotion Committee, available at <http://www.mocie.go.kr> (Last visited, June 25, 2005).

6) See KITA, “South-North Korea Trade Likely to Increase,” March 3, 2005, available at <http://global.kita.net> (Last visited, August 30, 2005).

7) As to preferential tax provisions allied to the Kaesong Industrial Complex, see Kang-Taeg Lim & Sung-Hoon Lim, *Strategies for Development of a North Korean Special Economic Zone through Attracting Foreign Investment* (Korea Institute for National Unification, 2005), p. 51.

possible transfer of sensitive products and technologies, particularly in the areas of information technology and machine tools, to North Korea.<sup>8)</sup> The United States government officials have been concerned that the project could become a transit point for the transfer of strategic items to North Korea. The South Korean government selected 15 South Korean firms to participate in the pilot phase of the three-phase project, but two companies could not receive authorization until late January 2005, after the firms deleted sensitive items from their lists of materials that the firms had been scheduled to transfer to the Complex.<sup>9)</sup>

As a member of the Wassenaar Arrangement, South Korea is under an obligation to prohibit exports or transfers of conventional arms and dual-use goods that can be converted into military use. Therefore, multilateral export control on strategic items emerged as a major obstacle to the South-North economic cooperation. The issue of export control on strategic items is very sensitive because it is also closely related to the development of nuclear weapons by North Korea.

The main purpose of this paper is to introduce South Korea's system of export control on strategic items and propose an effective enforcement policy to facilitate economic cooperation between South and North Korea. For this purpose, I will briefly introduce the multilateral system of export control on strategic items (II), and then review South Korea's system of export control on strategic items (III). As for South Korean businessmen, international and national system of export control on strategic items may be a troublesome obstacle to the participation in the South-North economic cooperation. In this context, this paper proposes some policies to administer effectively the export control system for successful economic cooperation between South and North Korea (IV).

8) En-Sun Kim, “Rocks at the Kaesong Complex Project,” *Newsweek* (Korean Edition), October 13, 2004, at. 61; “U.S. Blocking Kaesong Development Project,” *The Korea Times*, August 20, 2004 (pointing out that the real reason for U.S. concerns is that the project will bring North Korea large sums of foreign capital).

9) “2004 in Review: Export Controls and Nonproliferation in East Asia,” *Asian Export Control Observer* (December 2004/January 2005), Issue 5, p. 5; Ji-Hyun Kim, “Korea Catches up with Strategic Goods Control,” *The Korea Herald*, July 21, 2005 (reporting that the U.S. vetoed four Korean companies' applications to commence manufacturing at the Complex).

II. Multilateral Export Control Regimes on Strategic Items

A. The Wassenaar Arrangement and Non-Proliferation Regime of WMD

Because of the heightened concerns over terrorism raised by the attacks of September 11, 2001, the U.S. and multilateral export control regimes tightened export controls of dual-use products and technology for national security. Dual-use items are products or technology that are commercial or civil in nature but can be used to produce dangerous weapons. Multilateral export control regimes seek to prevent the proliferation of weapons of mass destruction (WMD) including nuclear, chemical, biological, and conventional weapons.

The four principal regimes are the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies (WA)<sup>10)</sup>; the Nuclear Suppliers Group (NSG); the Australia Group Chemical and Biological Weapons Nonproliferation Control Regime (AG); the Missile Technology Control Regime (MTCR). The U.S. and South Korea are members of all four regimes. The Export Control Regulations of the U.S. and South Korea apply to exports of civilian and dual-use products, software, and technology (see Table 1). Export controls for national security may be justified as lawful under the General Agreement of Tariffs and Trade (GATT) 1994 (Article XXI)<sup>11)</sup> and the World Trade Organization Agreements.<sup>12)</sup>

10) In July 1996, the Wassenaar Arrangement replaced the Coordinating Committee for Multilateral Export Controls (COCOM) which had served as a multilateral export control body for forty-five years since 1949 but terminated in March 1994 because of the fall of the Berlin wall and the end of Cold War.

11) GATT 1994, Article XXI (*Security Exceptions*) :  
Nothing in this Agreement shall be construed  
(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or  
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests  
(i) relating to fissionable materials or the materials from which they are derived;  
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;  
(iii) taken in time of war or other emergency in international relations; or  
(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Table 1 Multilateral Export Control Regimes

Regime	Year established	Purpose	Coverage	Number of members
NSG	1975	To ensure that nuclear trade for peaceful purposes does not contribute to the proliferation of nuclear weapons or explosive devices while not hindering such trade.	Atomic energy-related products and technology	44
AG	1985	To ensure that the industries of the members do not help nations acquire a chemical or biological weapon capability.	Chemical or biological agents related to chemical or biological weapons	39
MTCR	1987	To limit the risks of proliferation of weapons of mass destruction by controlling transfers that may contribute to delivery systems for such weapons.	Missile-related products, equipments and technology	34
WA	1996	To contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use products and technology.	Dual-use products and technology used to develop or manufacture weapons	33

Source: Homepages of NSG, AG, MTCR, WA.

The “no undercut” provisions under the four export control regimes require member nations to provide information about exports they deny, as well as notification when a member transfers products or technology that are essentially identical to items denied by other nations.<sup>13)</sup> However, the four multilateral export control regimes are not based on a legally binding international agreement, but merely the voluntary political commitments of members to abide by their objectives

12) See General Agreement on Trade in Services, Article XIV bis; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 73.

13) Jamil Jaffer, “Strengthening the Wassenaar Export Control Regime,” 3 *Chi. J. Int’l L.* 519 (2002), pp. 521-22.

and rules, according to their own national laws and policies. The regimes operate on the basis of consensus of all members and decisions on how to implement and interpret regime decisions are left solely to the national discretion of member governments.<sup>14)</sup> The consensus-based and voluntary nature of the regimes poses, therefore, organizational and political obstacles to implementing reforms necessary for the effective export control. In addition, the rapid pace of technological change and growing supply of sensitive items from proliferators complicates keeping control lists current, because these lists need to be updated more frequently.<sup>15)</sup>

### *B. Resolution 1540*

On April 28, 2004, the United Nations (U.N.) Security Council unanimously adopted "Resolution 1540" drafted by the U.S. Invoking the Council's power under Chapter VII of the U.N. Charter, the Resolution provides that "all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery." (para.1) Further the Resolution requires that "all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them." (para.2) It also requires all States to develop and enforce domestic controls to prevent WMD proliferation, such as measures for accounting for and protecting WMD, for maintaining effective border controls and law enforcement techniques, for controlling national exports and transshipments, and for criminal or civil penalties for violations of such export

14) "Unlike COCOM, Wassenaar members do not have veto power over one another's exports, do not have an agreed-upon list of embargoed or restricted countries, and do not have a requirement for notification of exports to shipment. The Wassenaar Arrangement merely requires an aggregate summary notification of listed exports after transfer takes place, and a notice of license denials." Christopher F. Corr, "The Wall Still Stands! Complying with Export Controls on Technology Transfers in the Post-Cold War, Post-9/11 Era," 25 *Hous. J. Int'l L.* 441 (2003), p. 455.

15) U.S. General Accounting Office, *Non-Proliferation: Strategy Needed to Strengthen Multilateral Export Control Regimes* (Report to Congressional Committees, October 2002), pp. 4, 22, 24, 27.

control laws and regulations (para.3).

Under the Resolution, the Security Council establishes a Committee ("1540 Committee"), consisting of all its members, that is to receive reports from States on their implementation of the Resolution and then report to the Council (para.4). The Resolution called upon States: (a) to promote the universal adoption and full implementation of multilateral treaties to which they are parties, whose aim is to prevent the proliferation of WMD; (b) to adopt national rules and regulations, where it has not yet been done, so as to ensure compliance with their commitments under the key multilateral nonproliferation treaties; (c) to fulfill their commitment to multilateral cooperation, in particular within the framework of the International Atomic Energy Agency, the Organization for the Prohibition of Chemical Weapons and the Biological and Toxin Weapons Convention, as important means of pursuing and achieving their common objectives in the area of non-proliferation and of promoting international cooperation for peaceful purposes; (d) to develop appropriate ways to work with and inform industry and the public regarding their obligations under such laws (para.8).

The Resolution called upon States to present a first report no later than October 28, 2004 to the 1540 Committee. As of July 26, 2005, 120 countries, along with the European Union, submitted national reports.<sup>16)</sup> South Korea's national report, submitted on October 27, 2004, emphasized that as a party to most of all relevant treaties of international disarmament and nonproliferation and multilateral export control regimes, South Korea had legal and administrative systems necessary to ensure compliance with the Resolution and it would continue to complement and develop those systems.<sup>17)</sup>

The Resolution 1540 marked a significant milestone in the development of international law on the subject of WMD proliferation. It should be, however, noted that the Resolution "*calls upon all States, in accordance with their national legal authorities and legislations and consistent with international law*, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related material." (para.10: emphasis added)

16) But North Korea has not submitted. The national reports are available at <http://disarmament2.un.org/Committee1540/report.html> (Last visited, August 25, 2005).

17) National Report of the Republic of Korea on the Implementation of United Nations Security Council Resolution 1540, S/AC.44/2004/(02)/24, p. 2.

Thus the Resolution is merely an invitation from the Council to States to cooperate in efforts to combat WMD proliferation in a manner consistent with existing domestic and international laws.<sup>18)</sup>

### *C. The Proliferation Security Initiative*

The Proliferation Security Initiative (PSI) is a multilateral effort to stop the shipment and transportation of WMD. Announced by President Bush on May 31, 2003, in Krakow, Poland, the goal of the PSI is to create a more dynamic and proactive approach to preventing proliferation of WMD. Eleven countries initially joined the PSI and,<sup>19)</sup> on September 4, 2003, adopted a “Statement of Interdiction Principles.”

Under the Interdiction Principles, PSI participants committed to establish more coordinated and effective measures through which to stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-State actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the U.N. Security Council. Apart from not trafficking in missiles and WMD themselves, these measures include cooperating in the search and seizure of suspect vessels that are flying their own flags, searching and stopping suspect foreign vessels that enter their ports, providing consent to the boarding and searching of a State's own flag vessels by other States, denying transit rights to suspect aircraft, and requiring any such planes that do enter its airspace to land for inspection.<sup>20)</sup>

However, the PSI is not based on a formal international agreement, but a set of activities. It is best understood as a set of partnerships that provides the basis for cooperation on specific activities, when the need arises. It does not create formal

18) Daniel H. Joyner, “The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law,” 30 *Yale J. Int'l L.* 507 (2005), p. 541.

19) They were Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Spain, the United Kingdom, and U.S. In the fall of 2003, Canada, Denmark, Norway, Singapore, and Turkey participated in PSI meetings. Some sixty other countries have reportedly agreed to cooperate on an ad hoc basis if a suspect ship or aircraft enters their territorial waters or airspace. Michael Byers, “Policing the High Seas: The Proliferation Security Initiative,” 98 *A.J.I.L.* 526 (2004), p. 529.

20) U.S. Department of State, “The Proliferation Security Initiative: Statement of Interdiction Principles,” Sept. 4, 2003, available at <http://www.state.gov/t/np/ris/fs/23764.htm> (Last visited, August 30, 2005).

legal obligations for participating States, but does represent a political commitment to prevent or stop proliferation-related shipments.<sup>21)</sup>

The PSI means a shift in U.S. foreign policy towards a more flexible approach to collective action that avoids both unilateralism and institutionalized multilateralism. From the viewpoint of U.S., this approach would seem to offer a few advantages. It may largely avoid problems of institutional blockage, such as those that can occur within the U.N. Security Council; it allows for the limitation of new initiatives to small groups of like-minded States, with the group then being expanded once momentum has been achieved; and it enables the U.S. to focus its persuasive efforts on those most able and willing to cooperate with respect to non-proliferation.<sup>22)</sup>

Conflicts of interests among powerful countries such as Russia and China may, however, limit its effectiveness and cause unnecessary disputes in international affairs.<sup>23)</sup> Although the PSI is global in nature, it is largely directed at North Korea.<sup>24)</sup> South Korea and Japan have thus expressed apprehensions that the hard line being taken by the U.S. could provoke North Korea. North Korea has repeatedly stated that any interdiction of its vessels or aircraft would be regarded as an act of war and that it would react accordingly.<sup>25)</sup>

21) John R. Bolton, “The Bush Administration's Forward Strategy for Nonproliferation,” 5 *Chi. J. Int'l L.* 395 (2005), p. 400.

22) Michael Byers, *supra* note 19, p. 544.

23) Russia recently joined PSI.

24) In April, 2003, the U.S. intercepted aluminum tubes (key components of high-speed centrifuges used to manufacture highly enriched uranium for nuclear weapons) likely bound for North Korea. A combined French and German effort also intercepted sodium cyanide likely bound for North Korea's nuclear weapons program. John Harrington, “Arms Control and National Security,” 38 *Int'l Law.* 391 (2004), pp. 393-94. See Testimony of John R. Bolton, Under Secretary for Arms Control and International Security, to the Committee on International Relations, U.S. House of Representatives, June 4, 2003, available at [http://www.house.gov/international\\_relations/108/bolt0604.htm](http://www.house.gov/international_relations/108/bolt0604.htm) (Last visited, June 25, 2005).

25) “North Korea Up In Arms,” *The Washington Times*, August 14, 2003. With respect to the legality in international law of the PSI, see Benjamin Friedman, “The Proliferation Initiative: The Legal Challenge” (Bipartisan Security Group, Sep. 4, 2003), pp. 2-9, available at [http://www.gsinsitute.org/pubs/09\\_03\\_psi\\_brief.pdf](http://www.gsinsitute.org/pubs/09_03_psi_brief.pdf) (Last visited, August 30, 2005).

### III. South Korea's System of Export Control on Strategic Items

#### A. Export Control Authorities

##### 1. Ministry of Commerce, Industry, and Energy

The Trade Cooperation Division of the Ministry of Commerce, Industry, and Energy (MOCIE) used to control COCOM items beginning in 1989. When the department was closed in 1998, however, the Import Division of the Ministry undertook the task of controlling strategic items. With a view to improving the effectiveness of export control on strategic items, MOCIE established the Strategic Items Control Division (SICD) in February 2004. SICD carries out comprehensive functions such as controlling strategic items (mainly industrial products) and administering export control regulations. In other words, SICD not only formulates policies on strategic items but also approves companies to export strategic items and performs tasks related to the management of the organization handling evaluation.

On February 17, 2005, MOCIE launched an online database system to help exporters determine whether their products are classified as strategic items and subject to Korea's export control regulations. The Strategic Item Export Control Information System was designed to allow registered users easy access to information and thereby increase the efficiency and accuracy of export control regulations.<sup>26)</sup> By utilizing a specialized search engine, Korean companies are now able to request and receive approvals for exports online, minimizing administrative paperwork and reducing the amount of time required to get export licenses.<sup>27)</sup>

##### 2. Ministry of Science and Technology

The Ministry of Science and Technology (MOST) controls atomic reactors, their components and related technologies. In case only technology is exported, MOST is the export license authority.

26) The Strategic Item Export Control Information System based on the Foreign Trade Act (Article 21 bis) is now available at <http://www.sec.go.kr> (Last visited, August 25, 2005).

27) "South Korea Launches Online Database for Strategic Items Exports," *Asian Export Control Observer* (February/March 2005), Issue 6, p. 2.

##### 3. Ministry of Defense

The Ministry of Defense (MOD) takes charge of approving the export of strategic items such as military products (arms, weapons, munitions).

##### 4. Korea Customs Service

The Korea Customs Service, dealing with tariff tasks related to imports and exports, has the authority to inspect and restrict the export of strategic items. The customs officers can inspect inbound and outbound or return goods.

##### 5. Ministry of Unification

The Ministry of Unification (MOU) is responsible for controlling strategic items related to the trade between South and North Korea.<sup>28)</sup> It also establishes and administers policies on the exchange and cooperation between the two Koreas and carries out education and promotion for the national reunification of the Korean Peninsula.

##### 6. Strategic Items Trade Information Center

The Strategic Items Trade Information Center (STIC) was established in August 2004 under the supervision of the Korea International Trade Association (KITA) to provide sufficient information on the trade of strategic items and perform related tasks more efficiently. Its major activities include determining whether a specific product or technology falls under the category of strategic items, promoting export controls on strategic items, fostering international cooperation and exchanges, offering consultation or information regarding the export of strategic items, developing export control guidelines including parameter sheets, helping businesses

28) Inter-Korean Exchange and Cooperation Act, Article 13.1: If any trading party desires to take out, or bring in goods, he shall obtain the license of the Minister for National Unification on goods, form of trade, and the price settlement method, under the conditions as prescribed by the Presidential Decree. The same shall apply in cases he desires to modify any important matters as prescribed by the Presidential Decree among from those matters for which a license has been issued.

establish compliance programs (CPs) and carrying out researches of domestic and overseas policies and regulations on strategic items. STIC also operates a portal system that provides comprehensive support related to export controls including on-line procedures for determination and export licenses.<sup>29)</sup>

### *B. Laws and Regulations for Export Control on Strategic Items*

South Korea's system of export control on strategic items was introduced by the enactment of the Enforcement Decree of the Foreign Trade Act (FTA) and the Regulation of Foreign Trade Management with a view to implementing domestically the "Memorandum of Understanding between the Government of the Republic of Korea and the Government of the United States on the Protection of Strategic Commodities and Technical Data" (hereinafter referred to as the "Korea-U.S. MOU") which was concluded on September 11, 1987.<sup>30)</sup> South Korea's export control on strategic items has been administered since July 1, 1993, according to FTA and its Enforcement Decree as well as the Public Notice on Export and Import of Strategic Items.<sup>31)</sup> The major contents of FTA, the Enforcement Decree of FTA, and the Unified Public Notice on Export and Import of Strategic Items and Technology (hereinafter referred to as the "Public Notice of Export/Import") enacted in December 2004, and revised in February, 2005, are as follows:

#### 1. Covered Items

The scope of strategic materials controlled by FTA is almost the same as the export restriction items under the Wassenaar Arrangement and Non-Proliferation Regime of WMD. The Public Notice of Export/Import provided a separate system for export control on strategic items by classifying them into "1st Class Strategic Items" and "2nd Class Strategic Items."<sup>32)</sup> "Strategic items" here refer to products or commodities (materials, facilities and equipments, components), software, and

29) See <http://stic.kita.net> (Last visited, August 30, 2005).

30) The Korea-US MOU put into force on May 11, 1989.

31) Korean Laws related to export control on strategic items include the Technology Development Promotion Act, the Atomic Energy Act, Act on Special Measures for Defense Industry, the Act on the Control of the Production, Export, Import, etc. of Specific Chemicals for the Prohibition of Chemical Weapons, etc.

32) Enforcement Decree of FTA, Article 39.1.

technology listed in Annexes 2-7 of the Public Notice of Export/Import and its export control is deemed necessary for the maintenance of international peace and security as well as national security. "1st Class Strategic Items" are those listed in Annex 2 (items related to the Wassenaar Arrangement), Annex 3 (items related to Non-Proliferation of Atomic Energy), Annex 4 (items related to Non-Proliferation of Missiles), Annex 5 (items related to Non-Proliferation of Biochemical Weapons), Annex 6 (items related to Chemical Weapons Convention) of the Public Notice of Export/Import. "2nd Class Strategic Items" are those listed under double-digit HS code (No.25-40, 54-59, 63, 68-93, and 95) in Annex 7 (2nd Class Strategic Items related to the Catch-all) of the Public Notice of Export/Import that are included as export control items as the new system of Catch-all commenced as of January 1, 2003.<sup>33)</sup>

If anyone makes use of the "HSK connection table" developed by MOCIE, even non-experts can easily find out items belonging to 1st Class Strategic Items by simply searching for the appropriate HS Code. In case of 2nd Class Strategic Items, the Public Notice of Export/Import provides the objective standards used in making determinations on whether an importer is connected to development of WMD.<sup>34)</sup>

In the case of items related to the Wassenaar Arrangement, the covered items are those agreed in the plenary meeting and are divided into two types of items: general industry items and defense industry items. "General industry items" are dual use items belonging to higher technologies that can be transformed as items for the defense industry. "Defense industry items" are those for direct military use such as

33) Public Notice of Export/Import, Article 2. Korea had adopted the Catch-all system when it revised the Public Notice of Export and Import of Strategic Items on December 24, 2002 in order to comply with non-proliferation regimes of WMD in the world community.

34) Article 20.2: When exporting 2nd Class Strategic Items, the trader and his/her representative must request for individual export approval from the head of the export approval agency as stipulated in Article 3 under any of the following cases: 1. If the importer or end user (hereinafter, refer to as "end user") intends to use the 2nd class strategic items in the manufacture, use, and storage of weapons of mass destruction as clearly indicated in the document, drawing, or electronic document (hereinafter, refer to as "document") acquired by the trader and his/her representative for the export of 2nd grade strategic items; 2. If the 2nd class strategic items are installed or used in areas where utmost secrecy is required, such as areas with military facilities or areas that are near military facilities, and if the use of the goods in question is believed to be doubtful; 3. If the trader and his/her representative believe that the end user intends to use the imported 2nd class strategic items in the manufacture, development, use, and storage of weapons of mass destruction considering the conditions and nature of the export transaction; 4. If the head of the strategic item export approval agency grants permission to export strategic items as stipulated in Article 3.



rifles, fighter airplanes, missiles, etc.  
However, all items mentioned above are not automatically controlled but only in relation to certain items that exceed the specific level of technology standards. According to the Korea-U.S. MOU, the scope of strategic items to be controlled is determined by mutual consultations.<sup>35)</sup>

2. Countries and Geographic Areas Covered

Exports of strategic items to “countries and geographic areas deemed dangerous for the international peace and the security” are controlled differently according to the destination. There are two types of areas where exports of strategic items are approved or restricted: “Area A” and “Area B.” The level of export control is different according to the area or destination and types of strategic items. Thus the Public Notice of Export/Import differentiated the export approval procedures according to the types of strategic items and export areas in order to improve efficiently the system of export control and to lessen the burdens on Korean traders.

Table 2 Area of Export Control

Area	Covered Country	1st Class Strategic Items	2nd Class Strategic Items
Area A	Argentina, Australia, Austria, Bulgaria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, England, the United States (Total: 28 countries)	Export license need not be requested, but a report of export transactions has to be submitted	Export license need not be requested
Area B	North Korea (only in case of being re-exported to North Korea via 3rd country), Iran, Iraq, India, Libya, Israel, North Korea, China, Russia, Taiwan, Hong Kong, Macao, etc. (Country or area which does not belong to Area A)	Export license has to be requested	Export license has to be requested only if the importer or end user meets the requirements under Article 20.2 of Public Notice of Export/ Import

Source: Public Notice of Export/Import, Annex 9.

35) Korea-U.S. MOU, Para. II-1.

Countries belonging to geographic area “A” are member countries of the four multilateral export control system of the Wassenaar Arrangement, Non-Proliferation of Atomic Energy, Non-Proliferation of Biochemical Weapons, and Non-Proliferation of Missiles. The division of export areas is based on the final destination of strategic items. When the export of a strategic item is destined for geographic area “A” via area “B,” the item is considered to be exported to geographic area “B.”<sup>36)</sup> It should be noted that North Korea is classified as geographic area “B” only when strategic items are re-exported to North Korea via the third country (see Table 2).<sup>37)</sup>

3. Export License Authorities

The export license of general industry items under the Wassenaar Arrangement, general industry items related to the Non-Proliferation of Atomic Energy, items related to the Non-Proliferation of Missiles, items related to the Non-Proliferation of Biochemical and Chemical Weapons (Schedule 1, Schedule 2 & Schedule 3) are issued by SICD within the MOCIE. The export of 2nd Class Strategic Items is also licensed by SICD.<sup>38)</sup>

The export license of defense industry items under the Wassenaar Arrangement is issued by the Department of International Cooperation within MOD. The export of general industry items under the Wassenaar Arrangement, missiles and biochemical and chemical weapons is also licensed by the Department of International Cooperation if the importer’s purpose is for military use. MOST issues export license to traders exporting only technology out of 1st Class Strategic Items and items used only for atomic energy. The export of technology related to 2nd Class Strategic Items is also licensed by MOST. When exporting products and software

36) See Annex 9 (Division of Areas of Export Control).

37) South and North Korea do not impose tariffs on goods exchanged between themselves, and the economic transactions between South and North Korea are not considered as foreign trade, but as intra-Korean commerce. See Protocol on the Implementation and Observance of Chapter 3, South-North Exchanges and Cooperation, of the Agreement on Reconciliation, Nonaggression and Exchanges and Cooperation, adopted on September 17, 1992, Article 1.10.

38) However, the export of organic and inorganic compounds of radioactive isotopes and atomic reactors and their components that belong to 2nd class strategic items is licensed by MST (Public Notice of Export/Import, Article 3.1).

belonging to strategic items, an export license should be obtained for the products from the export license authority provided at Annex 8 of the Public Notice of Export/Import. When exporting technologies together with the products and software, an export license should be obtained for the products and software from the export license authority provided at Annex 8. On the other hand, those who want to export only the technology related to military weapons and products must first obtain recommendation from MOD before requesting for export license from MOST.<sup>39)</sup> The head of the export license authority must consult with the Minister of Foreign Affairs and Trade first if the license of a strategic item is deemed to have serious impact on the nation's security or foreign policy.<sup>40)</sup>

In case of inter-Korean commerce, MOU approves the direct transfer of strategic items to North Korea. Since MOU lacks technical capability to review the possibility of military diversion, it may request a determination of strategic items to MOCIE, and afterward decide whether or not to issue export license to applicants, based on the results of the determination by MOCIE. MOU announces in the form of a Public Notice the lists of covered items that are subject to the export license.<sup>41)</sup>

#### 4. Preliminary Determination

It is the exporter who makes a determination whether items for export fall under 1st Class Strategic Items.<sup>42)</sup> Exporters or manufacturers who are not sure whether their products fall under 1st Class Strategic Items may request a determination from the export license authority by submitting 2 copies of the determination application form with relevant documents.<sup>43)</sup>

As to the strategic item determination authority, Article 3 of the Public Notice of Export/Import, in general, applies. However, so long as the determination of strategic items falling under the jurisdiction of MOCIE is concerned, the Strategic Items Trade Information Center (STIC) of KITA is in charge of preliminary determination, according to Article 53.1 of FTA and Article 116 of the Enforcement

39) Public Notice of Export/Import, Article 3.

40) Public Notice of Export/Import, Article 15.1.

41) See Inter-Korean Exchange and Cooperation Act, Article 14.

42) Public Notice of Export/Import, Article 6.1.

43) Public Notice of Export/Import, Article 7.1.

Decree of FTA.<sup>44)</sup>

In principle, the strategic item determination authority has to make a positive or negative ruling, within 15 days of the receipt of applications, for preliminary determination of whether the item falls under 1st Class Strategic Items. In case a separate deliberation is required, however, the deadline for the ruling may be extended.<sup>45)</sup> In case of a “negative ruling” or “not applicable ruling,” the strategic item determination authority must issue a corresponding certificate to the applicant or his representative.<sup>46)</sup>

When exporting the products in question with “positive ruling” or “applicable ruling” to area “B,” the exporter or his representative must get an export license from the export license authority. On the contrary, when exporting to area “A,” the exporter or his representative is not required to get export license but has to submit a report of export transactions to the export license authority.<sup>47)</sup> The products with “negative ruling” may be exported without the export license. The validity term of the determination ruling is 1 year from the date when the ruling was announced.<sup>48)</sup>

#### 5. Export License Procedures

When exporting 1st Class Strategic Items to area “B,” the exporter or their representative must request an export license (EL) from the export license authority. There are two different types of export licenses: “individual export license” (IEL) for the individual export of strategic items and “comprehensive export license” (CEL) for a particular item and for a certain period.<sup>49)</sup>

When exporting 2nd Class Strategic Items to area “B,” the trader or their representative must request for individual export license under the following cases: i) If the importer or end user (hereinafter referred to as “end user”) intends to use the 2nd Class Strategic Items in the manufacture, use, and storage of WMD as clearly indicated in the document, drawing, or electronic document acquired by the trader

44) Public Notice of Export/Import, Article 4.1.

45) Public Notice of Export/Import, Article 8.1.

46) Public Notice of Export/Import, Article 8.2.

47) Public Notice of Export/Import, Article 9.1.

48) Public Notice of Export/Import, Article 9.3.

49) Public Notice of Export/Import, Article 13.1.

and his representative for the export of 2nd Class Strategic Items; ii) if 2nd Class Strategic Items are installed or used in areas where utmost secrecy is required, such as areas with military facilities or areas that are near military facilities, and if the use of the goods in question is believed to be doubtful; iii) if the trader and his representative believe that the end user intends to use the imported 2nd Class Strategic Items in the manufacture, development, use, and storage of WMD considering the conditions and nature of the export transaction; iv) if the trader and his representative are notified to apply for an export license from the export license authority.<sup>50)</sup>

The export and re-export of 1st Class Strategic Items is, in principle, approved only when they are used for peaceful purposes.<sup>51)</sup> The Public Notice of Export/Import stipulates specifically principles and guidelines for export control according to the types of strategic items.<sup>52)</sup> The export license authority issues export licenses after deliberating the following: i) whether the export products belong to strategic items or not; ii) importing country of the products in question; iii) technical level and military and diplomatic sensibility of the products, iv) whether the products shall be used in the private sector; v) the importer, final receiver, and end user and the credibility of end use confirmed by the end user; vi) possibility of transfer of the products to export-restricted areas; vii) whether the exporter, importer, final receiver or end user of the products is disqualified for trading strategic materials.<sup>53)</sup> If the export license of strategic items is deemed to have serious effects on the nation's security or foreign policy, the head of the export license authority must consult in advance with the Minister of Foreign Affairs and Trade.<sup>54)</sup>

In the case of an individual export license,<sup>55)</sup> the export license authority must issue an export license (with a license number attached) or reject to issue it, within 15 days from the receipt of applications. When issuing export licenses, the export

50) Public Notice of Export/Import, Article 20.2.

51) Public Notice of Export/Import, Article 16.1.

52) See Public Notice of Export/Import, Articles 16, 17.

53) Public Notice of Export/Import, Article 22.1.

54) Public Notice of Export/Import, Article 15.1.

55) Individual export license refers to the approval granted by the export license authority regarding the application for the individual export of strategic items and export of items with confirmed volumes (Public Notice of Export/Import, Article 18).

license authority may attach conditions as necessary.<sup>56)</sup> The export license authority may terminate or cancel the validity of an export license in any of the following cases: i) the strategic items with export license are likely to be transferred to export-restricted areas in violation of the regulation; ii) when the head of the export license authority deems it necessary to cancel export licenses for security reasons or new changes in international affairs that occurred after issuing them.<sup>57)</sup>

The validity term of an individual export license is one year in principle.<sup>58)</sup> An export license can be exempted when certain requirements are satisfied.<sup>59)</sup> However, an exporter must submit a report of export transactions to the export license authority with 7 days of exporting the items.<sup>60)</sup>

In the case of a comprehensive export license, there are three different categories: The first is "general comprehensive export license" which allows the trader to export a particular item to area "A" for a certain period; the second is "special comprehensive export license" which allows the trader to export a particular item for a certain period to the same importer who has purchased from the exporter more than three times in the past two years; and the third is "commissioned processing comprehensive export license" which allows the trader to export for a certain period when the trader manufactures items under a commissioned processing contract and re-export them to a destination designated by the consignor within a certain period.<sup>61)</sup> The export license authority must decide whether to approve the application for comprehensive export within 42 days from the receipt of applications.<sup>62)</sup> The validity term of a general comprehensive export license is two years, while that of a special comprehensive export is one year. On the other hand, the validity term of a

56) Enforcement Decree of FTA, Article 39.3; Public Notice of Export/Import, Article 23.

57) Public Notice of Export/Import, Article 27.1.

58) Public Notice of Export/Import, Article 25.

59) For example, export license is not necessary in any of the following cases: i) Shipbuilding equipment or airplane supplies used for foreign shipping or airplanes within the territory of South Korea; ii) when exporting machine, equipment, and component used for emergency repair, without compensation, for the safe operation of ships or airplanes; iii) overseas diplomatic missions (including a foreign branch of the Korea Trade Investment Promotion Agency), Korean troops dispatched overseas, or public property sent for diplomatic mission; iv) freights and products sent to international institutions, which do not require export license according to the treaty or international commitment (Public Notice of Import/Export, Article 26.1).

60) Public Notice of Export/Import, Article 26.1.

61) Public Notice of Export/Import, Articles 32, 33, 34.

62) Public Notice of Export/Import, Article 34.1.

commissioned processing comprehensive export license is three years.<sup>63)</sup>

The purpose of a comprehensive export license is to allow business entities with a voluntary compliance system to export for a certain period by exempting individual export licenses, and thus to induce voluntary export control on the part of civilian business entities by simplifying export procedures. For non-strategic items, the above procedures are not required. When it is doubtful whether their products are strategic items or not, traders may apply for determination from the export license authority, with relevant documents.

## 6. Re-export License

The trader who wants to re-export the imported strategic items to a foreign country must obtain a re-export license from the export license authority. The procedures and requirements for re-export license are the same as those for an export license.<sup>64)</sup>

However, re-exporting licenses are not necessary, if the imported strategic items that are manufactured and processed using components are not considered strategic items and subject to the following conditions: i) if the value of the imported strategic items is less than 25% of the total price of goods (however, when Syria, Iran, Cuba, Sudan, and North Korea is the destination, less than 10%); ii) if it is impossible to separate the strategic items from the goods for export, or the original function of the goods is no longer detectable.<sup>65)</sup>

## 7. Voluntary Compliance System

The Public Notice of Export/Import named the internal export management system carried out voluntarily by domestic companies “voluntary compliance system,” and articulated “Model Voluntary Export Administration Regulations”<sup>66)</sup> that could be referred to as a guideline for business entities in performing their voluntary export control. Here, “voluntary compliance system” refers to the option

63) Public Notice of Export/Import, Article 35.

64) Public Notice of Export/Import, Article 38.

65) Public Notice of Export/Import, Article 39.

66) See Public Notice of Export/Import, Annex 11.

of the trader to refuse export transactions after deliberation based on the operation rules of strategic item export management (“Voluntary Export Administration Regulations”) prepared by an independent export transaction deliberation body (“Voluntary Export Administration Body”). It also refers to certain procedures or systems that can support applications for preliminary determination of strategic items and export licenses filed with MOCIE and the head of the administrative institution concerned.<sup>67)</sup>

In consideration of the importance of voluntary export control in international transactions, the Public Notice of Export/Import introduced a designation system of “voluntary compliance traders”<sup>68)</sup> and provided business entities abiding by their internal voluntary compliance system with special privileges by designating them as voluntary compliance traders. Voluntary compliance traders must regularly report to MOCIE, production and export performance of strategic items, operating status of the voluntary compliance system, etc.<sup>69)</sup>

On the other hand, voluntary compliance traders are exempted from applying for individual export licenses in their export of 1st Class Strategic Items, and simply required to submit a report of export transaction of strategic items, within 7 days of exporting 1st Class Strategic Items, to the export license authority.<sup>70)</sup> They are also entitled to apply for a comprehensive export license.<sup>71)</sup>

## 8. Penalties

FTA has reinforced penal provisions for the violation of laws and regulations on export control. Anyone who has obtained or attempted to obtain export licenses of strategic items in fraudulent or unjustifiable means, or who has exported or attempted to export strategic items without export licenses to an area in which such export is restricted and which is publicly announced by MOCIE shall be punished by imprisonment for less than five years, or by a fine not exceeding three times of the

67) Public Notice of Export/Import, Article 55.

68) Public Notice of Export/Import, Article 58.

69) Public Notice of Export/Import, Article 60.

70) On the contrary, the traders not designated as voluntary compliance traders must submit the report within 3 days of reporting the export transaction of strategic items (Public Notice of Export/Import, Article 19.3).

71) Public Notice of Export/Import, Article 30.2.

value of exported items.<sup>72)</sup> It should be noted that there were two recent cases where Korean companies were charged for violation of export control regulations.<sup>73)</sup>

Any representative of a legal person and its agent as well as the principal offender who have obtained or attempted to obtain export licenses for strategic items by fraudulent or unjustifiable means shall be punished in respect of functions of the legal person or the individual.<sup>74)</sup>

The Minister of MOCIE may prohibit export or import of strategic items for less than one year by designating them as a “disqualified party for trading strategic items,” for those who violated the provision of export license of strategic items under FTA (Article 21) or those who disturbed the international trade order regarding export and import of strategic items and those deemed as deserving of the sanctions for trading strategic items by MOCIE. The Minister of MOCIE may prohibit the trader from exporting or importing strategic items overseas, in the case of corresponding trade restrictions under the laws of the foreign country concerned.<sup>75)</sup>

#### **IV. Administration of Export Control System for the Successful Economic Cooperation between South and North Korea: Policy Proposals**

The multilateral and national export control regimes on strategic items and non-proliferation regimes of WMD may block up the successful operation of the Kaesong Industrial Complex project, and thus make it impossible or difficult for the Korean companies to transfer products and technologies necessary for operating the

72) FTA, Articles 54, 56; Public Notice of Export/Import, Article 65.1.

73) Both cases were related to the re-export of sodium cyanide. The Korean government could withhold the products from export and ordered the companies to redeem the sodium cyanide in question. Having found forgery and negligence of the companies, the Korean authorities brought the companies to trial. Sun-Jin Lee, “To Prevent WMD Falling into Wrong Hands,” *The Korea Herald*, June 17, 2004, at 13; In February 2004, MOCIE filed a legal complaint against a Korean company after the International Atomic Energy Agency (IAEA) discovered Korean-made balancing machines, which can be used to balance uranium enrichment centrifuges, in Libya. “2004 in Review: Export Controls and Nonproliferation in East Asia,” *supra* note 9, p.15.

74) FTA, Article 58 (Joint Penal Provisions).

75) Enforcement Decree for FTA, Article 45; Public Notice of Export/Import, Article 64.

project to North Korea. Since the revitalization of economic cooperation between South and North Korea may contribute to the acceleration of reconciliation and prosperity, the establishment of an inter-Korean economic community, and the peaceful reunification of the two Koreas, it is very important to find out appropriate means to facilitate the economic cooperation by operating successfully the project without jeopardizing the purpose of export control on strategic items.

#### *A. Enhancement of Flexible Interpretation of Strategic Items*

Export control on strategic items is designed for maintaining international peace and security and protecting national security. However, it can cause international disputes in connection with its legality as to economic coercion or intervention in sovereign States, if States concerned do not have the same views on the strategic evaluation of certain items.

In general, products affecting national security considerably may be considered strategic items. In this case, the “degree of effects on national security” may be a criterion for determining strategic items. Issues of national security occur when substantial national interests are threatened by negative actions or factors from outside. Traditionally, political independence and territorial integrity have been considered major factors affecting national security. With a view to preventing the abuse of export control on strategic items, stricter interpretation of national security is required. However, the concept of national security may be not clearly defined, and also there is no international agreement on the concept and scope of national security.

If strategic items are defined too widely, all industrial products that can be used for military purpose may be subject to export control, and this practically will block up the Kaesong Industrial Complex project and economic cooperation between South and North Korea. Since strategic items are those that can imperil international peace and security, it is more reasonable to exclude items not endangering international peace and security from the list of export control. Since the economic cooperation may lay the foundation for peaceful reunification of the two Koreas by accelerating amicable reconciliation and cooperation, more “flexible interpretation” is required as to the determination of strategic items. In particular, it is necessary to utilize positively Article 16 of the Public Notice of Export/Import that, in principle, allows export and re-export of strategic items “only for the purpose of peaceful use.”

Accordingly, it is necessary to apply flexibly the criteria for evaluating strategic items, with respect to the products transferred to North Korea for economic cooperation between South and North Korea. For example, factors such as “non military use of products,” “purpose of business,” “foundation of infrastructure for peaceful reunification” may be taken into consideration in determining the scope of strategic items. More relaxed criteria should be applied or adopted to the products transferred to specific areas appointed as special economic zone (SEZ) such as the Kaesong Industrial Complex.

In particular, the Minister of MOU should apply more flexible interpretation on the scope of strategic items, in connection with economic cooperation between South and North Korea, in due considerations of reconciliation and cooperation for mutual prosperity, and the achievement of peaceful reunification of the two Koreas.

### *B. Expeditious Determination on Strategic Items*

Expeditious determination of whether certain products or technologies fall under strategic items or not is required with a view to controlling effectively the export of strategic items. The Public Notice of Export/Import has increased the efficiency and expedition of the determination on strategic items by introducing a preliminary determination system. In principle, the strategic item determination authority has to make a positive or negative ruling, within 15 days of the receipt of applications, for the preliminary determination of whether certain products fall under 1st Class Strategic Items.<sup>76)</sup> The “Model Voluntary Export Administration Regulations”<sup>77)</sup> improved the voluntary compliance system by providing companies with specific guidelines, and the Public Notice of Export/Import introduced a designation system of voluntary compliance traders to simplify the export license procedures of strategic items.<sup>78)</sup>

Policy proposals for expediting the determination process of strategic items may be summarized as follows: to enhance transparency of the export license procedures by publishing concrete criteria for evaluating strategic items; to establish the export administration system of strategic items that provide clear and simple research on

76) Public Notice of Export/Import, Article 8.1.

77) Public Notice of Export/Import, Annex 11.

78) Public Notice of Export/Import, Article 58.

the internet for self-determination of strategic items, applications for export licenses, recording-keeping and information sharing; to recruit specialists on export control and train the personnel in charge of export control administration; to provide incentives to the companies that maintain voluntary compliance system.

### *C. Systematic Mechanism for Preventing Diversion to Military Use*

The reason for reinforcing export control to North Korea is that the industrial products transferred to North Korea can be converted into defensive equipments for military use. In particular, the U.S. government has been very much concerned that strategic items transferred to North Korea may be used for developing WMD. It is necessary to supply promptly and continuously products and technology needed for projects and business, in order to ensure the successful operation of those projects and to facilitate economic cooperation between South and North Korea. It is also necessary to establish a systematic safety net in order to prevent the conversion of supplied products into strategic items for military use and remove the concerns of the U.S. government as to the conversion of transferred products into military use. There is no justification for the U.S. government to reject the transfer of strategic items to North Korea, if it is ensured that transferred items are used “only for peaceful purpose.”

Policy proposals for preventing exports from being converted into military use may be summarized as follows: to declare publicly that the products supplied for economic cooperation between South and North Korea shall be used only for peaceful purposes; to establish a system where the U.S.A. or a third country may at any time confirm whether the products are used only for peaceful purposes; to attach the “radio frequency identification device/system”<sup>79)</sup> (RFID) on the products; and to make a joint declaration or an agreement to secure peaceful use of transferred products. North Korea should cooperate fully in developing the transparent and trustworthy administration system which ensures that the products transferred to North Korea are not to be used for military purposes, instead of complaining about the export control on strategic items.

79) The RFID is a method of remotely storing and retrieving data using devices called RFID tags/transponders.

#### *D. Utilization of the Rule of Foreign Availability*

If a covered State can import or obtain strategic items from third countries without any difficulty, it will be ineffective or unreasonable to prohibit strategic items from being exported to the State. Unilateral export control not based on international cooperation will only cause economic loss to domestic companies within the regulating State. Therefore, a more flexible policy to exclude certain items with foreign availability from the export control list is required, so long as North Korea can easily import or obtain the items from third countries.

It is necessary to utilize to the full extent the system of foreign availability under the U.S. regulations in order to minimize the negative effect of export control on strategic items with respect to economic cooperation between South and North Korea. Under the U.S. "Export Administration Regulation" (EAR), foreign availability exists when the Secretary of Commerce determines that an item is "comparable in quality"<sup>80)</sup> to an item subject to U.S. national security export controls, and is "available in fact"<sup>81)</sup> to a country, from a non-U.S. source, in "sufficient quantities"<sup>82)</sup> to render the U.S. export control of that item or the denial of a license ineffective. For a controlled country, such control or denial is ineffective when maintaining such control or denying a specific license would not restrict the availability of items that would make a significant contribution to the military potential of the controlled country or combination of countries detrimental to the national security of the U.S.<sup>83)</sup> If the Secretary determines that foreign availability exists, the Secretary may cancel export control or approve the license in question if there is no foreign policy reason to deny the license, unless the President decides it is harmful for national security.<sup>84)</sup>

80) An item is of "comparable quality" to an item controlled under the EAR if it possesses the characteristics specified in the Commerce Control List (CCL) for that item and is alike in key characteristics that include, but are not limited to: (1) function; (2) technological approach; (3) performance thresholds; (4) maintainability and service life; and (5) any other attribute relevant to the purpose for which the control was placed on the item. 15 C.F.R. § 768.1(d).

81) An item is "available-in-fact" to a country if it is produced within the country or if it may be obtained by that country from a third country. 15 C.F.R. § 768.1(d).

82) "Sufficient quantities" means the amount of an item that would render the U.S. export control, or the denial of the license in question, ineffective in achieving its purpose. 15 C.F.R. § 768.1(d).

83) 15 C.F.R. § 768.2(a).

84) 15 C.F.R. § 768.3(a).

Foreign availability is a practical and effective system because it may minimize the impairment of national security by illegal export of strategic items and maximize the benefits to the national economy and business by promoting the free trade of industrial products. It is strongly recommended for the Korean government to introduce foreign availability provisions in the FTA to prevent conflict with the U.S. government requesting strict export control on strategic items to North Korea and facilitate economic cooperation between South and North Korea.

#### *E. Close Consultation between South Korea and the U.S.*

Under the Korea-U.S. MOU, the list of strategic items to be controlled by Korea is due to be determined by consultations with U.S.<sup>85)</sup> In addition, South Korea undertook not to permit re-export of U.S.-origin controlled strategic items which have been imported into South Korea without verifying that written approval of U.S. has been obtained, when such approval is required.<sup>86)</sup>

The U.S. prohibits the shipment of strategic items, without export licenses, to countries considered to be supporting terrorism (North Korea, Cuba, Iraq, Libya, Sudan and Syria), if those products are made in U.S. or more than 10% of their components are sourced from the U.S.<sup>87)</sup> In this context, on November 17, 2005, KT Corp., Korea's largest fixed-line telephone and broadband internet supplier, succeeded in obtaining the U.S. approval for telecommunications equipment that it plans to install in the Kaesong Industrial Complex.<sup>88)</sup> Thus, the approval will pave the way for KT to provide telecom services to Korean firms operating in the Complex.

Since the penalty under the EAR may do considerable damage on the Korean companies doing business in the Complex,<sup>89)</sup> close consultation between South

85) The Korea-U.S. MOU, Para. II-1.

86) The Korea-U.S. MOU, Para. II-4.

87) 15 C.F.R. § 734.4(c).

88) "KT to ship telecom gear to Gaeseong," *The Korea Herald*, 18 November, 2005. KT agreed to set the landline phone charge at 40 U.S. cents a minute last March, a considerable drop in price compared to the current \$2.3 per minute. "Seoul-Kaesong Telephone Link-Ups Will Open This Year," *The Korea Times*, 17 November, 2005.

89) Under the EAR, it is a violation to "engage in any conduct prohibited by or contrary to, or refrain from engaging in any conduct required by the EAA, the EAR, or any order, license, or authorization issued

Korea and the U.S. is very important for the successful operation of the Complex. The scope of coverage of the EAR is extremely broad. The scope includes the following: (1) all commodities, technology, and software in the U.S.; (2) all U.S. origin commodities, technology, and software wherever situated; (3) U.S. origin parts, components, materials or other commodities integrated abroad into foreign-made products, U.S. origin software commingled with foreign software, U.S. origin technology commingled with foreign software, respectively, in quantities exceeding de minimis levels; (4) certain foreign-made direct products based on U.S. origin technology and software when shipped to certain destinations.<sup>90)</sup>

## V. Conclusion

Export control on strategic items is indispensable for national security as well as international peace and security. Multilateral and national export control regimes are a key policy tool to combat against terrorism and prevent the proliferation of WMD. In response to the heightened concerns over terrorism and national security raised by the attacks of September 11, 2001, South Korea as well as other States participating in multilateral export control regimes tightened export controls on dual-use items.

However, multilateral and national export control systems may block up the successful operation of the Kaesong Industrial Complex project, and impede the expansion of economic cooperation between South and North Korea. It should be noted that the revitalization of the economic cooperation may contribute to the acceleration of reconciliation and prosperity, and the peaceful reunification of the two Koreas. With a view to carrying out successfully economic cooperation with

---

thereunder.”(15 C.F.R. § 764.2) Under the EAR, violations may result in severe both criminal and civil/criminal penalties, including imprisonment of company directors, officers and employees, and substantial fines. The potential penalties for “knowing violations” include imprisonment of up to five years, and fines of up to \$50,000 or five times the value of the exports involved, whichever is greater. On the contrary, the potential penalties for each “willful violation” by an individual range from fines of up to \$250,000 to imprisonment of up to ten years, or both. For companies, the penalty for each violation may be up to \$1 million or up to five times the value of the exports involved, whichever is greater. The EAR also provides for a series of administrative sanctions including revocation of export licenses held by the violator, general denial of the violator’s export privileges, exclusion of the exporter from export transactions, and the imposition of fines for each violation. 15 C.F.R. § 764.3(a) & (b).

90) 15 C.F.R. § 734.3(a).

North Korea, a strategy to enhance the effectiveness of export control system should be reviewed. In this context, this article proposed the articulation of transparent and explicit criteria for evaluating dual-use, the development of mechanisms for preventing diversion to military use, a flexible interpretation of dual-use items in consideration of foreign availability, and close consultation between South Korea and the U.S.